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May 15, 2002

The Honorable David M. Walker
Comptroller General of the United States
United States General Accounting Office
441 G Street NW
Washington, D.C. 20548

Dear Mr. Comptroller:

I am writing to request that you conduct a study of the process by which the Department of Energy (DOE) chooses to reimburse its contractors for legal costs. As a senior Member of the Energy and Commerce Committee, which has jurisdiction over management of the DOE, I am concerned that U.S. taxpayers may be paying for such legal costs, even when the legal activities undertaken by the DOE contractor are frivolous or unnecessary.

According to March 8, 2002 correspondence you sent to Rep. Jim Gibbons, there have been more than 2,100 cases involving various types of complaints against DOE from fiscal year 1995 through the third quarter of fiscal year 2001. In that timeframe, DOE has reimbursed its contractors more than \$290 million for litigation and disposition costs, while the contractors have spent only about \$13 million in their own defense. For example, the University of California was reimbursed for almost \$55 million worth of legal costs during that time period, Lockheed Martin Energy Systems received more than \$29 million, Dow Chemical received almost \$26 million, and Westinghouse Savannah River received more than \$27 million.

Your correspondence indicates: that DOE has issued guidelines on what constitutes reasonable legal costs; that the costs are not reimbursable if there is liability caused by the contractor's willful misconduct, lack of good faith, or failure to exercise prudent business judgement; that DOE has defined "prudent business judgement" as acting in the same manner as a prudent person in the conduct of a competitive business; and that DOE determines on a case-by-case basis whether a contractor has exercised willful misconduct or lack of good faith. However, GAO does not appear to have conducted an analysis of whether the guidelines or DOE's case-by-case judgements are reasonable. I am concerned that out of all the legal costs incurred by the contractors from 1995-2001, DOE elected to reimburse more than 95% of them.

A March 12, 2002 article on the Sacramento Bee website detailed a recent case in which Lawrence Livermore National Laboratory (LLNL) was ordered by a jury to pay \$1 million in damages to Ms. Dee Kotla, who sued the lab for wrongful termination. Ms. Kotla alleged that she was retaliated against and ultimately fired by LLNL in 1997 because she testified at a sexual harassment trial involving other LLNL personnel. LLNL reportedly said it fired Ms. Kotla for misuse of her computer and her telephone.

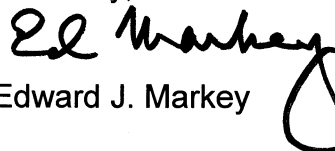
However, according to the article, Ms. Kotla only had \$4.30 in local telephone charges, and said that her use of her computer was minimal. This case took 5 years to resolve, and if the press story is correct, seems to have been, at best, an unnecessary waste of time and money on the part of the University of California (UC), the contractor of LLNL. The article also stated that Ms. Kotla could not be paid punitive damages because UC is a public State entity, even though the wrongdoing alleged by Ms. Kotla took place using federal funds and in support of a national mission. According to DOE, it has reimbursed more than \$400,000 in the Kotla case, and may reimburse additional costs before the case is fully resolved.

I am concerned that if DOE fails to adequately assess the merits of the legal cases to which its contractors are a party, and reimburses the contractors indiscriminately, DOE contractors will have no incentive to settle cases that are either frivolous or in which they are in the wrong. This will result in years of frustration and burdensome legal expenses for whistleblowers such as Ms. Kotla and other entities involved in legal actions with DOE contractors. It will also be a waste of taxpayer funds. Consequently, I ask that you immediately initiate an investigation to assess:

- 1) Is DOE implementing its guidelines used to determine whether to reimburse contractor legal costs in a consistent fashion?
- 2) Whether DOE properly applies its definition of whether the contractor used "prudent business judgement" when it incurred the legal costs.
- 3) How do other Federal Agencies and the private sector go about determining whether to reimburse their contractors for legal fees incurred?
- 4) For each legal case involving a DOE contractor, a) whether the DOE contractor is a State sovereign entity such as UC and b) whether the contractor sought to avoid litigation or certain remedies (such as having to pay punitive damages) due to its status as a State sovereign entity.
- 5) A legal analysis of whether UC and other educational institutions should be able to contract with the DOE as not-for-profit contractors, rather than as educational institutions, while asserting their claims of Sovereign immunity when litigation is brought against them for conduct associated with the operation of the laboratory for the DOE. Based on your review of relevant case law,¹ should the UC (and other educational institutions operating DOE facilities) be considered to have waived their claims of Sovereign immunity in litigation related to their management and operation of DOE facilities for which they are contracted as not-for-profit contractors?

Thank you very much for your consideration of this important matter. If you have any questions, please have your staff contact Dr. Michal Freedhoff of my staff at 202-225-2836.

Sincerely,



Edward J. Markey

¹ See, for example, Genentech vs Eli Lilly and the University of California, Fedex vs USPS, Regents of the University of California v. DOE U.S. Supreme Court Ruling, etc.